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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/560,323

12/09/2005

Jeffrey J. Wooster

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The Dow Chemical Company  
Intellectual Property Section  
P.O. Box 1967  
Midland, MI 48641-1967

EXAMINER

NUTTER, NATHAN M

ART UNIT

PAPER NUMBER

1796

MAIL DATE

DELIVERY MODE

02/25/2009

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b> 10/560,323	<b>Applicant(s)</b> WOOSTER ET AL.	
	<b>Examiner</b> Nathan M. Nutter	<b>Art Unit</b> 1796	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 19 December 2008.
- 2a) ☒ This action is **FINAL**.                      2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1,3,5-10,12-19 and 21-25 is/are pending in the application.
- 4a) Of the above claim(s) 5,9,10,12,14-18 and 21-25 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1,3,6-8,13 and 19 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)                     | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____                                      |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)          | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____  | 6) <input type="checkbox"/> Other: _____                          |

## **DETAILED ACTION**

### ***Response to Amendment***

In response to the amendment filed 19 December 2008, the following is placed in effect.

The rejection of claims 1, 3, 6-8, 13 and 19 under 35 U.S.C. 102(b) as being clearly anticipated by Bosiers et al (US 5,874,139, is hereby expressly withdrawn.

The rejection of claims 1, 3, 6-8, 13 and 19 under 35 U.S.C. 102(e) as being anticipated by Parikh et al (US 6,566,446), is hereby expressly withdrawn.

### ***Double Patenting***

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 1, 3, 6-8, 13 and 19 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-9

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of copending Application No. 10/541,832 (US 2006/0046048) Kapur et al. Although the conflicting claims are not identical, they are not patentably distinct from each other because the claims of the copending application may embrace a blend composition of a homogeneously branched interpolpolymer of ethylene and an alpha olefin with a heterogeneously branched copolymer of ethylene. With a view to the Specification to grasp the metes and bounds of the claims, note paragraphs [0016]-[0021] wherein the density of the heterogeneously branched copolymer is higher than the homogeneously branched copolymer. Note paragraph [0025] for the seal initiation temperature. Further, note paragraphs [0055]-[0058].

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

Claims 1, 3, 6-8, 13 and 19 are rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-15 of U.S. Patent No. 6,723,398 (Chum et al). Although the conflicting claims are not identical, they are not patentably distinct from each other because the claims of the patent may embrace a blend composition of a homogeneously branched interpolpolymer of ethylene and an alpha olefin with a heterogeneously branched copolymer of ethylene. With a view to the Specification to grasp the metes and bounds of the claims, note column 3 (lines 38-58), column 4 (lines 36-50), column 7 (lines 48-57), column 8 (lines 8-46) and column 10 (lines 33-38).

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***Claim Rejections - 35 USC § 102***

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

(e) the invention was described in a patent granted on an application for patent by another filed in the United States before the invention thereof by the applicant for patent, or on an international application by another who has fulfilled the requirements of paragraphs (1), (2), and (4) of section 371(c) of this title before the invention thereof by the applicant for patent.

The changes made to 35 U.S.C. 102(e) by the American Inventors Protection Act of 1999 (AIPA) and the Intellectual Property and High Technology Technical Amendments Act of 2002 do not apply when the reference is a U.S. patent resulting directly or indirectly from an international application filed before November 29, 2000. Therefore, the prior art date of the reference is determined under 35 U.S.C. 102(e) prior to the amendment by the AIPA (pre-AIPA 35 U.S.C. 102(e)).

Claims 1, 3, 6-8, 13 and 19 are rejected under 35 U.S.C. 102(b) as being clearly anticipated by Falla et al (US 5,360,648).

The reference teaches the film blend at column 2 (line 53) to column 3 (line 16), column 4 (lines 34-57), column 5 (lines 29 et seq.), column 6 (lines 14-19 and 38-43), the paragraph bridging column 6 to column 7, column 7 (lines 27-30), column 9 (lines 3-10) and column 9 (line 54) to column 10 (line 15).

Claims 1, 3, 6-8, 13 and 19 are rejected under 35 U.S.C. 102(e) as being anticipated by Kapur et al, US 2006/0046048.

The applied reference has a common assignee with the instant application. Based upon the earlier effective U.S. filing date of the reference, it constitutes prior art under 35 U.S.C. 102(e). This rejection under 35 U.S.C. 102(e) might be overcome either by a showing under 37 CFR 1.132 that any invention disclosed but not claimed in the reference was derived from the inventor of this application and is thus not the invention "by another," or by an appropriate showing under 37 CFR 1.131.

The copending application may embrace a blend composition of a homogeneously branched interpolpolymer of ethylene and an alpha olefin with a heterogeneously branched copolymer of ethylene. Note paragraphs [0016]-[0021] wherein the density of the heterogeneously branched copolymer is higher than the homogeneously branched copolymer. Note paragraph [0025] for the seal initiation temperature. Further, note paragraphs [0055]-[0058].

Claims 1, 3, 6-8, 13 and 19 are rejected under 35 U.S.C. 102(e) as being anticipated by Chum et al (US 6,723,398).

The applied reference has a common assignee and inventor with the instant application. Based upon the earlier effective U.S. filing date of the reference, it constitutes prior art under 35 U.S.C. 102(e). This rejection under 35 U.S.C. 102(e) might be overcome either by a showing under 37 CFR 1.132 that any invention disclosed but not claimed in the reference was derived from the inventor of this application and is thus not the invention "by another," or by an appropriate showing under 37 CFR 1.131.

The claims of the patent may embrace a blend composition of a homogeneously branched interpolpolymer of ethylene and an alpha olefin with a heterogeneously branched copolymer of ethylene. Further, note column 3 (lines 38-58), column 4 (lines 36-50), column 7 (lines 48-57), column 8 (lines 8-46) and column 10 (lines 33-38).

### ***Response to Arguments***

Applicant's arguments filed 19 December 2008 have been fully considered but they are not persuasive.

With regard to the provisional rejection of claims 1, 3, 6-8, 13 and 19 on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-9 of copending Application No. 10/541,832 (US 2006/0046048) Kapur et al, no Terminal Disclaimer has been filed herein. Applicants did not argue this rejection.

With regard to the rejection of claims 1, 3, 6-8, 13 and 19 on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-15 of U.S. Patent No. 6,723,398 (Chum et al), no Terminal Disclaimer has been filed herein. Applicants did not argue this rejection.

With regard to the rejection of claims 1, 3, 6-8, 13 and 19 under 35 U.S.C. 102(b) as being clearly anticipated by Falla et al (US 5,360,648), while the patent does not "select" the polymers "to ensure that the overall melt index is less than that of the

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homogeneously branched component,” the patent embraces those that do. The claims are drawn to a product which may be the same as herein claimed. Applicants argue that the melt index of the heterogeneously branched component is disclosed as “slightly higher than the range given for the homogeneously branched part.” The instant Specification suffers the identical problem. Note the Melt Index of the homogeneously branched component may be “from 0.2 grams/10 min (g/10 min) to 200 g/10 min,” and the heterogeneously branched copolymer has an identical Melt Index of “from 0.2 grams/10 min (g/10 min) to 200 g/10 min.” The reference teaches polymer blends that may clearly be encompassed.

When a reference discloses all of the limitations of a claim except a property or function, and the Examiner is unable to determine whether or not the reference inherently possesses properties that anticipate or render obvious the claimed invention, basis exists for shifting the burden of proof to applicant. Note *In re Fitzgerald et al* 619 F. 2d 67, 70, 205 USPQ 594, 596 (CCPA 1980). Note MPEP § 2112-2112.02.

With regard to the rejection of claims 1, 3, 6-8, 13 and 19 under 35 U.S.C. 102(e) as being anticipated by Kapur et al, US 2006/0046048, again, while the patent does not “select” the polymers “to ensure that the overall melt index is less than that of the homogeneously branched component,” the patent embraces those that do. The claims are drawn to a product which may be the same as herein claimed. Applicants argue that the melt index of the heterogeneously branched component is disclosed as “slightly higher than the range given for the homogeneously branched part.” The instant



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Specification suffers the identical problem. Note the Melt Index of the homogeneously branched component may be "from 0.2 grams/10 min (g/10 min) to 200 g/10 min," and the heterogeneously branched copolymer has an identical Melt Index of "from 0.2 grams/10 min (g/10 min) to 200 g/10 min." The reference teaches polymer blends that may clearly be encompassed.

With regard to the rejection of claims 1, 3, 6-8, 13 and 19 under 35 U.S.C. 102(e) as being anticipated by Chum et al (US 6,723,398), the reference may, indeed, embrace the two polymers recited and claimed herein. while the reference teaches a "(m)ost prefer(ed), the first interpolymers is a homogeneously branched ethylene interpolymers having an I<sub>2</sub> melt index equal to or lower than that of the second interpolymers which would be a heterogeneously branched ethylene interpolymers," the reference simply does not exclude the combinations as recited herein.

**THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of

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the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Nathan M. Nutter whose telephone number is 571-272-1076. The examiner can normally be reached on 9:30 a.m.-6:00 p.m..

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, James J. Seidleck can be reached on 571-272-1078. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Nathan M. Nutter/  
Primary Examiner, Art Unit 1796

nmn

18 February 2009

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